Supreme Court, U.S.
FILED

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No. 031158 FEB 11 2004

In The

Supreme Court of the United States

ZANE GREENE, *et al.*,

Petitioners,

v.

SPRINT COMMUNICATIONS COMPANY L.P., *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In order to "promote competition among payphone service providers and promote the widespread deployment of payphone services to the benefit of the general public," Section 276(b)(1)(A) of the Communications Act directs the Federal Communications Commission ("FCC") to "establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone." 47 U.S.C. § 276(b)(1)(A). However, the statute does not specify who should bear the fair compensation obligation, nor the amount or method of payment. In implementing that statute, the FCC promulgated regulations requiring certain common carriers to pay payphone service providers a specific amount for each call completed from a payphone ("payphone compensation"). *See* 47 C.F.R. §§ 64.1300 *et seq*. Petitioners are payphone service providers who seek to enforce such payment obligation against Respondents through an action in federal court. The questions presented are as follows:

1. Where a federal statute directs a federal agency to adopt regulations to provide "fair compensation" to a certain class, but does not specify who should bear the compensation obligation, whether the agency's implementing regulations defining the payor class and the parameters of the payment obligation are enforceable by members of the beneficiary class against members of the payor class.

2. Whether a payphone service provider has an express private right of action under 47 U.S.C. §§ 206 and 207, which provide for suits against common carriers for

QUESTIONS PRESENTED – Continued

violations of the Communications Act, to recover payphone compensation from common carriers upon whom FCC regulations, promulgated pursuant to 47 U.S.C. § 276(b)(1)(A), impose the "fair compensation" obligation.

3. Whether a payphone service provider has an implied private right of action under 47 U.S.C. § 276(b)(1)(A) and the FCC regulations implementing that statute, to recover payphone compensation from the common carriers upon whom such regulations impose the "fair compensation" obligation.

4. Whether the Ninth Circuit's decision that payphone service providers do not have a private right of action to enforce the FCC's regulations implementing 47 U.S.C. § 276(b)(1)(A) conflicts with the Congressional intent to "ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone."

PARTIES TO THE PROCEEDING

PETITIONERS

ZANE GREENE
DL COMMUNICATIONS, a California partnership
NATE BROGIN
BAY DISTRIBUTION SERVICES, INC., a California corporation
C&M TELECOMMUNICATIONS, INC., a California corporation
C/B TEL, INC., a Washington corporation
CAROL PALUMBO
MAHNOOSH AFRASHTEH
ROBERT A. COOK
COVENANT DEVELOPMENT, INC., a Washington S-Corporation
DARRELL CHENEY; EASY COIN VENDING CORPORATION, a New York S-Corporation
EXPENSE MANAGEMENT, INC., a California corporation
GENERAL COMMUNICATION SERVICES, LLC, a California limited liability company
GLOBAL PAYPHONE SYSTEMS, LLC, a Michigan limited liability company
HANFORD JOINT UNION HIGH SCHOOL DISTRICT, a California corporation
HEIDI MILLER
DONG JU LEE
ROY LANGE
JON ADAMS
JACK O'NEAL
JOE LISHA
JO ANN MOGENSEN
STEVE LITTLEJOHN
METROPHONE TELECOMMUNICATIONS, INC., a Washington corporation
MIKE GOLDEN

PARTIES TO THE PROCEEDING – Continued

CHARLES PARSONS
P&P PHONES, a California partnership
PAC WESTERN, a California partnership
PAYCOM, INC., a Washington corporation
PAYTEL COMMUNICATIONS, INC., a Washington corporation
PAYTEL WEST, INC., a Washington corporation
PC1, LLC, a California limited liability company
GREAT VICTORIA, INC., a California corporation
PBS TELECOM, a California S-Corporation
DUDLEY HERNDON COMPANY, a California corporation
PINNACLE PUBLIC SERVICES, LLC, an Oregon limited liability company
PROFESSIONAL COMMUNICATIONS, a Montana partnership
ROYCE TAWNEY
RICHARD BOREN
NEVADA TELEPHONE, INC., a Nevada corporation
TOM SCHWEIKERT
JON S. HOLLER
SANDRA J. GREENLAND
WESTERN COMMUNICATION SYSTEMS, INC., a California S-Corporation
GREGORY J. WOLFE d/b/a WESTERN PAYPHONE SYSTEMS
WESTERN TELEPHONE, INC., a Nevada corporation
JEFFREY M. WHITE
WILLIAM H. BALL

RESPONDENTS

SPRINT COMMUNICATIONS COMPANY L.P., a Delaware limited liability company
THE FURST GROUP, INC., a New Jersey corporation

PARTIES TO THE PROCEEDING – Continued

NETWORK ENHANCED TECHNOLOGIES, INC.,
a California corporation
JENKINTOWN, LTD., a Pennsylvania corporation
WILLIAMS COMMUNICATIONS, LLC,
a Delaware limited liability company
COOPERATIVE COMMUNICATIONS, INC.,
a New Jersey corporation

CORPORATE DISCLOSURE STATEMENT

Pursuant to SUP. CT. RULE 29.6, I hereby certify that the none of the Petitioners herein has a parent corporation, nor does any publicly held company own ten percent (10%) or more of the stock of any corporation that is a Petitioner herein.

Floyd A. Jensen
Attorney for Petitioners

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The opinion of the Ninth Circuit Court of Appeals on the merits (attached hereto as Appendix A, App. 1-13) is reported at 340 F.3d 1047 (9th Cir. 2003). The opinion of the District Court for the District of California, Central Division (attached hereto as Appendix B, App. 14-18) is unreported. The order of the Ninth Circuit Court of Appeals denying the petition for panel rehearing and rehearing en banc (attached hereto as Appendix C, App. 19) is unreported.

JURISDICTION

The Ninth Circuit entered its decision in this case on August 25, 2003, and entered its order denying Petitioners' timely petition for rehearing or rehearing en banc on October 14, 2003. This Court extended the deadline for filing a petition for a writ of certiorari to February 11, 2003.

This Court has jurisdiction under 28 U.S.C. § 1254(1) to review this petition for a writ of certiorari to the Ninth Circuit. The jurisdiction of this Court is also invoked under Supreme Court Rule 10(c), in that the Ninth Circuit has decided an important question of federal law that has not been, but should be, settled by this Court, and has decided an important question of federal law in a way that conflicts with relevant decisions of this Court.

STATUTES AND REGULATIONS INVOLVED IN THE CASE

28 U.S.C. § 1331

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

47 U.S.C. § 276(b)(1)(A)

> In order to promote competition among payphone service providers and promote the widespread deployment of payphone services to the benefit of the general public, within 9 months after February 8, 1996, the Commission shall take all actions necessary (including any reconsideration) to prescribe regulations that
>
> > (A) establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone, except that emergency calls and telecommunications relay service calls for hearing disabled individuals shall not be subject to such compensation.

47 U.S.C. § 206

> In case any common carrier shall do, or cause or permit to be done, any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a

reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

47 U.S.C. § 207

Any person claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the Commission as hereinafter provided for, or may bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction; but such person shall not have the right to pursue both such remedies.

47 C.F.R. § 64.1300. Payphone compensation obligation.

(a) Except as provided herein, the first facilities-based interexchange carrier to which a completed coinless access code or subscriber toll-free payphone call is delivered by the local exchange carrier shall compensate the payphone service provider for the call at a rate agreed upon by the parties by contract.

(b) The compensation obligation set forth herein shall not apply to calls to emergency numbers, calls by hearing disabled persons to a telecommunications relay service or local calls for which the caller has made the required coin deposit.

(c) In the absence of an agreement as required by paragraph (a) of this section, the carrier is obligated to compensate the payphone service provider at a per-call rate of $.24.

STATEMENT OF THE CASE

A. Background

Until the divestiture of the Bell system in 1984, only local exchange carriers ("LECs") provided payphone services. The costs of payphones and related equipment were included in the LECs' regulated rate base as local exchange facilities, because the central office switch controlled most of the payphone functions.

Following the Bell system breakup, manufacturers developed "smart" payphones that do not need to be controlled by a LEC central office switch. As a result, beginning in the 1980s, independent payphone service providers began to compete with LECs for the provision of payphone services to the public. *See In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128 (FCC 96-254, Notice of Proposed Rulemaking, 11 F.C.C.R. 6716 (released June 6, 1996) ¶¶ 2-6.

Prior to 1996, independent payphone service providers were disadvantaged vis-à-vis LECs, because LECs received some compensation for every call placed on their payphones (*i.e.*, from access charges paid by interexchange carriers), whereas the independent payphone service providers received no compensation at all for most 800-type calls (also referred to as "coinless" or "dial-around" calls).[1] In addition, LECs were able to subsidize their payphone operations from other business revenues.

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[1] Such calls include toll-free calls (*e.g.*, 1-800-FLOWERS) and access code calls (*e.g.*, 1-800-CALL-ATT).

Recognizing that payphones are an essential part of the national telecommunications system, Congress concluded, in the Telecommunications Act of 1996, that "competition among payphone service providers" and "the widespread deployment of payphone services" should be promoted. 47 U.S.C. § 276. To do so, Congress did two things. First, it prohibited the Bell operating companies from subsidizing or discriminating in favor of their own payphone services. *See* 47 U.S.C. § 276(a). Thus all payphone service providers, both independents and LECs, were placed on equal footing, where the economic viability of a payphone would depend solely on the revenue it could generate on its own.

Second, Congress directed the FCC to "prescribe regulations that . . . establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone. . . ." 47 U.S.C. § 276(b). Such a plan was necessary to achieve Congress' underlying goal of promoting competition and the widespread deployment of payphones.

In response to the statutory directive of § 276, the FCC initiated a rulemaking proceeding, and on September 20, 1996, released its Report and Order establishing a per-call compensation plan. *See In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, 91-35 (FCC 96-388), Report and Order, 11 F.C.C.R. 20,541 (released September 20, 1996). The Report and Order concluded that "full and unfettered competition is the best way of achieving Congress' dual objectives to promote competition among payphone service providers and promote the widespread deployment of

payphone services to the general public." *Id.* at 55 (*citing* 47 U.S.C. § 276(b)(1)).[2]

The FCC rulemaking ultimately resulted in regulations, now codified at 47 C.F.R. §§ 64.1300 *et seq.*, which require interexchange carriers to pay compensation to payphone service providers at the rate of 24¢ per call for every completed access code and toll free call made from a payphone. *See In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Third Report and Order and Order on Reconsideration of the Second Report and Order, 14 F.C.C.R. 2545 (released Feb. 4, 1999).

The Petitioners are independent payphone service providers who seek to recover from Respondents the compensation to which they are entitled under the FCC regulations promulgated under the authority of 47 U.S.C. § 276(b)(1)(A).

B. Proceedings Below

On May 13, 2002, Petitioners filed a complaint in the District Court for the Central District of California, alleging that Respondents owed the Petitioners various sums of money as payphone compensation for dial-around calls made from payphones owned by the Petitioners and carried over Respondents' long distance

[2] The FCC has modified the original plan in a series of subsequent orders in the same docket, but always adhering to the fundamental goal of promoting competition in the payphone industry and the widespread deployment of payphones.

telephone networks. The complaint alleged that the Respondents' obligation to pay arose under regulations promulgated by the FCC pursuant to 47 U.S.C. § 276(b)(1)(A), which requires the FCC to "establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone. . . ." The applicable regulations required Respondents to track compensable calls and to pay payphone service providers $.24 for each compensable call. *See* 47 C.F.R. §§ 64.1300.

On July 2, 2002, before any defendant had filed an answer or other responsive pleading, the district court, *sua sponte*, dismissed the complaint for lack of subject matter jurisdiction, holding that no private right of action exists under 47 U.S.C. § 276(b)(1)(A) or the regulations implementing it. Petitioners appealed that decision to the Ninth Circuit.

On August 25, 2003, the Ninth Circuit[3] issued its unanimous opinion affirming the district court's decision dismissing Petitioners' complaint for lack of subject matter jurisdiction.[4] The Ninth Circuit held that Section 276 does not establish Petitioners' right to compensation from interexchange carriers, notwithstanding that the

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[3] The panel consisted of Circuit Judges Alex Kozinski, Ferdinand F. Fernandez, and Pamela Ann Rymer. Judge Rymer wrote the opinion.

[4] No party argued against a private right of action. Respondents elected not to appear. Qwest Communications Corp. filed an amicus brief supporting federal court jurisdiction. The American Public Communications Council, which represents many payphone owners, also filed an amicus brief supporting federal court jurisdiction.

regulations implementing Section 276 expressly require interexchange carriers to pay Petitioners 24¢ per call for dial-around calls, and notwithstanding that 47 U.S.C. §§ 206 and 207 expressly provide for a private right of action against common carriers in federal district court for violations of Chapter 5 of Title 47 (Section 276 being part of Chapter 5).

On October 14, 2003, the Ninth Circuit Court of Appeals entered its order denying Petitioners' timely petition for panel rehearing and rehearing en banc.

C. Statement of Court of Appeals and Supreme Court Jurisdiction

The Ninth Circuit had jurisdiction over the appeal from the district court's order of dismissal pursuant to 28 U.S.C. § 1291. The appeal to the Ninth Circuit was timely because the order appealed from was entered on July 2, 2002, and the Petitioners filed a notice of appeal on July 31, 2002. *See* FED. R. APP. P. 4(a)(1)(A).

The jurisdiction of this Court is invoked under Supreme Court Rule 10(c), in that the Ninth Circuit Court of Appeals has decided an important question of federal law in a way that has not been, but should be, settled by this Court, and has decided an important question of federal law in a way that conflicts with relevant decisions of this Court.

REASONS FOR GRANTING A WRIT OF CERTIORARI

I. INTRODUCTION.

Prior to the 1996 Telecommunications Act (the "Act"), independent payphone service providers received no compensation for most toll-free and access code calls, even though they were prohibited from blocking such calls from their payphones. *See* 47 U.S.C. § 226(e)(2).[5] Congress enacted Section 276 of the Act to redress that inequity, as well as the inequity created by local exchange carriers subsidizing their own payphone operations. *See* 47 U.S.C. § 276 ("Section 276"). In Section 276, Congress stated its purpose "to promote competition among payphone service providers and promote the widespread deployment of payphone services to the benefit of the general public," by directing the FCC to "establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone." 47 U.S.C. § 276(b)(1)(A).

In Section 276, Congress delegated to the FCC the task of determining how and by whom such payment should be made. However the FCC might resolve those details, the evident intent of Section 276 was to benefit

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[5] 47 U.S.C. § 226(e)(2) prohibits advance payment (*e.g.*, by coin deposit) for dial-around calls. It provides in pertinent part: "The Commission shall consider the need to prescribe compensation (other than advance payment by consumers) for owners of competitive public pay telephones for calls routed to providers of operator services that are other than the presubscribed provider of operator services for such telephones."

payphone service providers by "ensuring" fair compensation for dial-around calls. Only by ensuring payment of fair compensation could the purpose of promoting competition and the widespread deployment of payphones be achieved.

In implementing the Congressional intent expressed in Section 276, the FCC promulgated regulations that required interexchange carriers to pay payphone service providers 24¢ for each completed dial-around call from a payphone. *See* 47 C.F.R. § 64.1300. The purpose of the regulation is identical to the purpose of the statute – to benefit payphone service providers by ensuring that they receive fair compensation for all calls placed from their payphones.

In the case at bar, the Ninth Circuit held that no private right of action exists to enforce the payment obligation imposed by the payphone compensation regulation. If allowed to stand, the Ninth Circuit's decision will have a devastating effect on payphone service providers, who will have a meaningless right (to receive compensation) without a remedy (to enforce payment). It gives license and incentive to interexchange carriers not to pay payphone compensation as required by FCC regulation. The economic impact will force many payphone owners out of business, which, ironically, will defeat the Congressional intent expressed in Section 276 to promote the widespread deployment of payphones and competition among payphone service providers by ensuring that they receive fair compensation for every completed call from their payphones.

The Ninth Circuit simply failed to recognize that Section 276 expresses two parallel and mutually dependent purposes: to promote competition and the widespread deployment of payphones, and to fairly compensate payphone service providers. The first purpose cannot be achieved without providing a means to enforce payment of fair compensation.

The Ninth Circuit decision raises an important question of federal law that has not been, but should be, settled by this Court, namely whether payphone service providers have a private right of action to enforce payment of the payphone compensation to which they are entitled under the FCC regulation implementing Section 276. The Ninth Circuit decision also raises the broader question whether federal courts have subject matter jurisdiction over actions by private parties who seek to enforce regulations of a federal agency that directly implement acts of Congress that are plainly intended to benefit such private parties. The questions are of great importance, because the Ninth Circuit's decision threatens to impair the entire payphone industry, which is an essential part of the national telecommunications system, by making it impossible for payphone service providers to enforce the payment obligations that the FCC has placed on interexchange carriers. Such a result would drive many independent payphone service providers out of business, and thereby defeat the express Congressional purpose to promote competition among payphone service providers and the widespread deployment of payphones.

The Ninth Circuit decision also presents important questions of federal law, because it conflicts with and fails to properly apply at least three important decisions or lines of decision of this Court. The first, *Alexander v.*

Sandoval, 532 U.S. 275 (2001), establishes that a private right of action lies to enforce agency regulations implementing acts of Congress. The second, *Cort v. Ash*, 422 U.S. 66 (1975), establishes that a private right of action should be implied where four factors are present, all of which are present in this case. The third, *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), held that a court is required to defer to and follow the authoritative interpretation of a statute by an agency authorized to implement the statute. In this case, the FCC has expressly stated that "failure to pay in accordance with the Commission's payphone rules . . . constitutes . . . a violation of section 276." Report and Order, *In the Matter of The Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128 18 F.C.C.R. 19975 ¶ 32 (October 3, 2003), *citing American Public Communications Council v. F.C.C.*, 215 F.3d 51, 56 (D.C. Cir. 2000).

Finally, the Ninth Circuit decision threatens national uniformity in the application of the payphone compensation system. Under that decision, payphone service providers within the Ninth Circuit have no remedy for a carrier's failure to pay the full amount of compensation owed under the regulation, while payphone service providers in other circuits may enforce payment through an action in federal court.[6] *E.g.*, *compare Greene v. Sprint Comm. Co.*,

[6] Under 47 U.S.C. § 207, an aggrieved party has the option to pursue an action against a carrier for violation of the Communications Act by filing a complaint in federal district court or with the FCC. By holding that no private right of action exists, the Ninth Circuit's decision in *Greene* forecloses a payphone service provider's right to

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340 F.3d 1047 (9th Cir. 2003), with *APCC Services, Inc. v. Cable & Wireless, Inc.*, 281 F. Supp. 2d 52 (D.D.C. 2003) and *APCC Services, Inc. v. Sprint Communications Co. L.P.*, 2003 WL 22996761 (Dec. 17, 2003) (holding that a private right of action exists to enforce the regulation implementing Section 276).[7] The conflicting standards adversely affect not only payphone service providers, some of whom own payphones both within and outside the Ninth Circuit, but also interexchange carriers whose long distance networks are national in scope. Indeed, the conflicting decisions in *Greene* and *APCC Services v. Sprint* create irreconcilable standards in different jurisdictions for the same interexchange carrier, which is the Respondent in this case. Under the current state of the law, Respondent may not be sued for payphone compensation in the Ninth Circuit, but it may be sued for payphone compensation in the District

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pursue an action before the FCC to enforce payment of payphone compensation.

[7] Recognizing the conflict between its decision and the case at bar, the court in *APCC v. Sprint Communications Co.* certified that case and several other similar cases against other interexchange carriers for interlocutory appeal to the D.C. Circuit Court. Noting that APCC Services represents more than 400,000 of the 500,000 to 600,000 payphone lines in the United States, that the large interexchange carriers in the other cases before the D.C. District Court were "the major players in almost all the litigation countrywide," and that the FCC itself, "a frequent party before the D.C. Circuit," has a significant interest in the resolution of these jurisdictional issues, the court concluded:

> The industry as a whole would thus benefit from a ruling from the Court of Appeals, for not only will the resolution of these issues be dispositive of the cases before this Court, but it will provide persuasive authority for courts in other jurisdictions, as well as for the FCC.

Id.

of Columbia. This Court should review this case to resolve the existing conflict.

II. THE NINTH CIRCUIT DECISION CONFLICTS WITH AND FAILS TO PROPERLY APPLY RELEVANT DECISIONS OF THIS COURT.

A. The Decision Fails to Properly Apply *Alexander v. Sandoval.*

In *Alexander v. Sandoval*, 532 U.S. 275, 284 (2001), this Court held that a private cause of action may be brought to enforce regulations directly implementing a statute, where the regulations constitute the authoritative interpretation of the statute.

> [The] regulations applying § 601's [of the 1964 Civil Rights Act] ban on intentional discrimination are covered by the [private] cause of action to enforce that section, [because] [s]uch regulations . . . authoritatively construe the statute itself, . . . and it is therefore meaningless to talk about a separate cause of action to enforce the regulations apart from the statute. A Congress that intends the statute to be enforced through a private cause of action intends the authoritative interpretation of the statute to be so enforced as well.

Id. at 284 (citations omitted).

The principle that a private right of action exists to vindicate violations of the regulations implementing a statute, where the regulations "authoritatively construe the statute itself," applies to the payphone compensation regulation at issue in this case. Section 276 is not merely a directive to the FCC, as the Ninth Circuit suggests. *See*

Greene, 340 F.3d at 1050-52. It confers upon payphone service providers a right to be "fairly compensated for each and every completed intrastate and interstate call using their payphone[s]." 47 U.S.C. § 276(b)(1)(A). The regulation, in turn, simply provides the details necessary to implement the statutory right created by Section 276. *See* 47 C.F.R. § 64.1300. The payment obligation set forth in the regulation constitutes the FCC's "authoritative interpretation of the statute" under which that regulation was promulgated. *Sandoval*, 582 U.S. at 284.

In this case, the regulation does more than "authoritatively construe" Section 276. Without the regulation, the right to fair compensation would be meaningless, and without the statute, the regulation would be groundless. Thus, the proper inquiry is not whether a violation of Section 276, standing alone, or a violation of its implementing regulation, standing alone, is actionable. Rather, the proper inquiry is whether there is a private right of action under the comprehensive scheme set forth by Congress, including both Section 276 and the regulation it charges the FCC with adopting to meet Congress' directive that payphone service providers receive "fair compensation."

Although the Ninth Circuit cited *Sandoval*, it avoided a meaningful *Sandoval* analysis by observing that *Sandoval* illustrates that not all regulations provide a private cause of action. *See Greene*, 340 F.3d at 1050-51. That is, the Ninth Circuit focused on the portion of *Sandoval* that is not applicable to this case, where this Court concluded that if a regulation goes beyond the scope, authority, and intent of the authorizing statute that it seeks to implement, there is no private right of action. *See Sandoval*, 536 U.S. at 285, 288-89. What the Ninth Circuit

failed to do, but what a proper *Sandoval* analysis requires, is to examine whether the FCC's regulation requiring the payment of payphone compensation constituted "the authoritative interpretation of the statute." *See Sandoval*, 532 U.S. at 284.

The payphone compensation regulation implements the Congressional mandate embodied in Section 276 by specifying what it means to be "fairly compensated." Thus when a common carrier violates the regulations, it is effectively doing something "declared to be unlawful" within the meaning of 47 U.S.C. § 206 and is therefore subject to suit under 47 U.S.C. § 207.[8] The relationship

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[8] 47 U.S.C. § 206 expressly provides a comprehensive private right of action against common carriers for damages caused by violation of other sections of Chapter 5 of the Act:

> In case any common carrier shall do, or cause or permit to be done, any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

47 U.S.C. § 207 expressly authorizes actions in federal court against common carriers for violation of Chapter 5 of the Act, giving a claimant the choice of pursuing a claim for damages either in federal court or before the FCC:

> Any person claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the Commission as hereinafter provided for, or may bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, in any district court of the United States of

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between the regulation and the statute is direct and mutually reinforcing; the regulation gives definition and substance to the statute and does not create a different substantive standard. Thus *Sandoval* compels the conclusion that the regulation requiring carriers to pay compensation to payphone service providers, which directly implements the mandate of Section 276, is enforceable by a private right of action. *See also, MCI Telecommunications Corp. v. FCC*, 59 F.3d 1407, 1413-14 (D.C. Cir. 1995), *cert. denied*, 517 U.S. 1240 (1996) (violations of FCC regulations are actionable under 47 U.S.C. §§ 206 and 207); *American Public Communications Council v. F.C.C.*, 215 F.3d 51, 56 (D.C. Cir. 2000) ("the '[f]ailure to pay the required compensation is a violation of FCC rules for which the carrier is subject to ***damages*** as well as fines and penalties.' *See* 47 U.S.C. §§ ***206-08***, 501-03 (1994)") (emphasis added); *APCC Services Inc. v. Cable & Wireless, Inc.*, 281 F. Supp. 2d 52 (D.D.C. 2003). Furthermore, a finding of an express private right of action would be consistent with the FCC's own reading of Section 276:

> A failure to pay in accordance with the Commission's payphone rules . . . constitutes both a violation of section 276 and an unjust and unreasonable practice in violation of section 201(b) of the Act.

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competent jurisdiction; but such person shall not have the right to pursue both such remedies.

The term "this chapter" refers to Chapter 5 of the Act, which concerns wire or radio communications and encompasses all of the statutes cited and discussed herein.

Report and Order, *In the Matter of The Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128 18 F.C.C.R. 19975 ¶ 32 (October 3, 2003), *citing American Public Communications Council v. F.C.C.*, 215 F.3d 51, 56 (D.C. Cir. 2000).[9]

B. The Decision Misapplied *Cort v. Ash*.

In *Cort v. Ash*, 422 U.S. 66 (1975), this Court established a four-factor test to determine whether an implied private right of action exists to enforce a statute:

> First, is the plaintiff one of the class for whose especial benefit the statute was enacted . . . that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . . And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Id. at 78 (internal citations and quotations omitted).

Although the second factor – Congressional intent – is paramount,[10] all of the *Cort* factors are satisfied in this

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[9] *See infra* Section II(C) for further discussion of this FCC pronouncement.

[10] *See Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15-16 (1979) ("[t]he other *Cort* factors are relevant insofar as they assist

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case. First, Section 276 clearly identifies a class to be protected, namely payphone service providers. Second, the purpose of Section 276, to fairly compensate payphone service providers, coupled with the statutory directive to the FCC to provide the details of the compensation plan, indicates a legislative intent to create a remedy for payphone service providers. Third, it is plainly consistent with the underlying purposes of Section 276, to "promote competition among payphone service providers and promote the widespread deployment of payphone services to the benefit of the general public," to imply a private remedy for payphone service providers, many of whom would likely go out of business without the ability to enforce payment for dial-around calls. The widespread deployment of payphones can only occur where payphone service providers have an effective means of enforcing payment of fair compensation for the use of their payphones. And finally, the cause of action is not traditionally relegated to state law, in an area that is basically the concern of the states, because the deployment of payphones as part of the national telecommunications system is a matter of national concern, as evidenced by the passage of Section 276 itself and the considerable attention that the FCC has devoted to the issue.

With regard to Congressional intent, this Court "has found that Congress intended to create a cause of action 'where the language of the statute explicitly confers a right directly on a class of persons that includes the plaintiff in the case.'" *Universities Research Ass'n v.*

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in determining congressional intent," *citing Touche Ross & Co. v. Redington*, 442 U.S. 560, 575-76 (1979)).

Coutu, 450 U.S. 754, 771-72 (1981), *quoting Cannon v. Univ. of Chicago*, 441 U.S. 677, 690 n. 13 (1979) ("the right- or duty-creating language of [a] statute has generally been the most accurate indicator of the propriety of implication of a cause of action"). Section 276 confers just such a right directly on payphone service providers – the right to be fairly compensated for every call.

In the case at bar, with respect to the issue of an implied private right of action, the Ninth Circuit paid as little heed to *Cort* as it did to *Sandoval*. It concluded that because it found no *express* Congressional intent to create a private right of action, further analysis of the *Cort* factors was not necessary. *See Greene*, 340 F.3d at 1052. This conclusion misapprehends and misapplies *Cort*, and begs the very issue for which a *Cort* analysis is designed: whether a right of action can be implied *even though it is not expressed*. Congressional "intent may appear implicitly in the language or structure of the statute, or in the circumstances of its enactment." *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 18, 100 S.Ct. 242, 246, 62 L.Ed.2d 146 (1979).[11]

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[11] Congressional intent can be found in statutes that do not express it. In *Thompson v. Thompson*, 484 U.S. 174 (1988), this Court stated:

> In determining whether to infer a private cause of action from a federal statute, our focal point is Congress' intent in enacting the statute. . . . Our focus on congressional intent does not mean that we require evidence that Members of Congress, in enacting the statute, actually had in mind the creation of a private cause of action. The implied cause of action doctrine would be a virtual dead letter were it limited to correcting drafting errors when Congress simply forgot to codify its evident intention to provide a cause of action. Rather, as an *implied* cause of action doctrine suggests, "the

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To simply pass over the analysis of an implied private right of action, as the Ninth Circuit did, by saying that the court "thinks" Congress did not intend a private right of action, is improper because it assumes the conclusion. If the *Cort* factors are present, as they surely are in this case, then a court should conclude that Congress intended to imply a private right of action. Hence the Ninth Circuit decision conflicts with and misapplies *Cort*.

Congressional intent to create a private right of action to enforce the payment of payphone compensation also appears in the statutory context into which Section 276 was placed, as part of Chapter 5 of Title 47. Sections 206 and 207 of that same chapter provide an express private right of action in federal district court against a common carrier for a violation of any other provision of Chapter 5. Similarly, 47 U.S.C. § 407 provides in relevant part:

> If a carrier does not comply with an order for the payment of money within the time limit in such

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> legislative history of a statute that does not expressly create or deny a private remedy will typically be equally silent or ambiguous on the question. *Cannon v. University of Chicago*, 441 U.S. 677, 694, 99 S.Ct. 1946, 1956, 60 L.Ed.2d 560 (1979).

Id. at 179 (emphasis in original, citations omitted).

In *Cannon v. Univ. of Chicago*, 441 U.S. 677, 694 (1979) (*quoting Cort*, 422 U.S. at 82), this Court stated that where "federal law has granted a class of persons certain rights, it is not necessary to show an intention to create a private cause of action." This Court further indicated that it is "decidedly receptive" to implying a private remedy "when that remedy is necessary or at least helpful to the accomplishment of the statutory purpose. . . ." *Cannon*, 441 U.S. at 703. In this case, the statutory purpose is plainly expressed in Section 276 – to ensure that PSPs receive fair compensation.

> order, the complainant, or any person for whose benefit such order was made, may file in the district court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the line of the carrier runs, or in any State court of general jurisdiction having jurisdiction of the parties, a petition setting forth briefly the causes for which he claims damages, and the order of the Commission in the premises.

Additionally, Section 416(c) of the same chapter requires common carriers to "observe and comply with [Commission] orders so long as the same shall remain in effect." 47 U.S.C. § 416(c). Coupled with Sections 206 and 207, which provide a private right of action in federal district court when a common carrier "omit[s] to do any act, matter, or thing in this chapter required to be done," this section clearly demonstrates a Congressional intent to provide a private right of action to enforce FCC orders.

These provisions in the very chapter into which Section 276 was placed manifest a Congressional intent to provide a remedy in federal court to enforce FCC orders and regulations that require a carrier to perform some act, including, expressly, the payment of money to a third party. It is illogical and out of harmony with the overall scheme of Chapter 5 of Title 47 to conclude, as the Ninth Circuit did, that even though Congress expressly provided a comprehensive private right of action for violations of Chapter 5, it did not intend for payphone service providers to have a remedy in federal court to enforce the payment of the "fair compensation" that it directed the FCC to establish. Nothing in the language of Section 276 supports a

conclusion that Congress meant to carve out such an exception to its general intent to provide a private right of action in federal court for violations of Chapter 5 of Title 47.

C. The Decision Fails to Apply *Chevron U.S.A., Inc. v. Natural Resources Defense Council.*

The FCC has recognized that payphone owners have a private right of action to collect payphone compensation. In the generic docket concerning payphone compensation, the FCC released a Report and Order on October 3, 2003 clarifying and prospectively modifying its payphone compensation rules. In that order, the FCC stated *inter alia*:

> A failure to pay in accordance with the Commission's payphone rules, such as the rules expressly requiring such payment that we adopt today, constitutes both a violation of section 276 and an unjust and unreasonable practice in violation of section 201(b) of the Act.

Report and Order, *In the Matter of The Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128 18 F.C.C.R. 19975 ¶ 32 (October 3, 2003), *citing American Public Communications Council v. F.C.C.*, 215 F.3d 51, 56 (D.C. Cir. 2000).

This pronouncement by the FCC represents an authoritative interpretation of the statute at issue in this case, to which the Ninth Circuit should have given deference.

See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843-44 (1984).[12]

In *Chevron*, this Court declared:

> The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress. If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

467 U.S. at 843-44 (internal quotations and citations omitted).

The Ninth Circuit's decision fails to mention, much less defer to, the FCC's interpretation of Section 276, which the FCC is empowered to implement and interpret. By failing to acknowledge and apply the *Chevron* deference doctrine in this case, the Ninth Circuit has decided

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[12] The Ninth Circuit was made aware of the FCC interpretation of Section 276 by means of a letter from Petitioners' counsel dated October 8, 2003, which was submitted pursuant to, FED. R. APP. P. 28(j). The Ninth Circuit entered its order denying Petitioners' petition for rehearing on October 14, 2003.

an important federal question in a way that conflicts with a relevant decision of this Court. *See* SUP. CT. RULE 10(c).

CONCLUSION

Petitioners respectfully submit that the Ninth Circuit erred in the following respects:

- Even though 47 U.S.C. §§ 206 and 207 grant an express private right of action in federal court for violations of other provisions of Chapter 5 of the Communications Act, and *Alexander v. Sandoval* establishes the existence of a private right of action to enforce regulations implementing a statute, the Ninth Circuit erroneously held that no private right of action exists to enforce the FCC regulations that authoritatively interpret and implement Section 276.

- The Ninth Circuit misapplied *Cort v. Ash*, holding that because Section 276 does not explicitly provide for a private right of action, none can be implied. A proper *Cort* analysis compels the conclusion that a private right of action should be implied because Section 276 is plainly intended to benefit the class of payphone service providers by requiring that they be fairly compensated for calls made from their payphones.

- The Ninth Circuit failed to defer to the FCC's interpretation of Section 276 as required under the *Chevron* deference doctrine. The FCC has unequivocally declared that failure to pay payphone compensation constitutes a violation of Section 276.

Therefore, Petitioners respectfully request that the Supreme Court grant review of this matter.

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ZANE GREENE; DL COMMUNICATIONS, a California partnership; NATE BROGIN; BAY DISTRIBUTION SERVICES INC., a California Corporation; C&M TELECOMMUNICATIONS INC., a California Corporation; C/B TEL INC., a Washington corporation; CAROL PALUMBO; MAHNOOSH AFRASHTEH; ROBERT A. COOK; COVENANY DEVELOPMENT INC., a Washington S-corporation; DARRELL CHENEY, EASY COIN VENDING CORPORATION, a New York S-Corporation; EXPENSE MANAGEMENT INC., a California corporation; GENERAL COMMUNICATION SERVICES LLC, a California limited liability company; GLOBAL PAYPHONE SYSTEMS LLC, a Michigan limited liability company; HANFORD JOINT UNION HIGH SCHOOL, a California corporation; HEIDI MILLER; DONG JU LEE; ROY LANGE; JON ADAMS; JACK O'NEAL; JOE LISHA; JO ANN MOGENSEN; STEVE LITTLEJOHN; METROPHONE TELECOMMUNICATIONS INC., a Washington corporation; MIKE GOLDEN; CHARLES PARSONS; P&P PHONES, a California partnership; PAC WESTERN, a California partnership; PAYCOM INC., a Washington corporation; PAYTEL COMMUNICATIONS INC., a Washington corporation; PAYTEL WEST INC.,

No. 02-56339

D.C. No.
CV02-03841-LGB

OPINION

a Washington corporation; PC1 LLC, a California limited liability company; GREAT VICTORIA INC., a California corporation; PBS TELECOM, a California S-corporation; DUDLEY HERNDON COMPANY, a California corporation; PINNACLE PUBLIC SERVICES LLC, an Oregon limited liability company; PROFESSIONAL COMMUNICATIONS, a Montana partnership; ROYCE TAWNEY; RICHARD BOREN; NEVADA TELEPHONES INC., a Nevada corporation; TOM SCHWEIKERT; JON S. HOLLER; SANDRA J. GREENLAND; WESTERN COMMUNICATION SYSTEMS INC., a California S-corporation; GREGORY J. WOLFE, d/b/a Western Payphone Systems; WESTERN TELEPHONE INC., a Nevada corporation; JEFFREY M. WHITE; WILLIAM H. BALL,

Plaintiffs-Appellants,

v.

SPRINT COMMUNICATIONS COMPANY, a Delaware limited liability company; THE FIRST GROUP INC., a New Jersey corporation; NETWORK ENHANCED TECHNOLOGIES INC., a California corporation; JENKINTOWN LTD., a Pennsylvania corporation; WILLIAMS COMMUNICATIONS LLC, a Delaware limited liability company; COOPERATIVE COMMUNICATIONS, a New Jersey corporation,

Defendants-Appellees.

Appeal from the United States District Court
for the Central District of California
Lourdes G. Baird, District Judge, Presiding

Argued and Submitted
July 9, 2003 – Pasadena, California

Filed August 25, 2003

Before: Alex Kozinski, Ferdinand F. Fernandez, and
Pamela Ann Rymer, Circuit Judges.

Opinion by Judge Rymer

COUNSEL

Floyd A. Jensen, Ray, Quinney & Nebeker, Salt Lake City, Utah, and Joel F. Tamraz, Los Angeles, California, for the plaintiffs-appellants.

No appearance for defendants-appellees.

Albert H. Kramer, Dickstein Shapiro Morin & Oshinsky, Washington, D.C., for amici curiae American Public Communications Council, Inc., and APCC Services, Inc.

Andrea Sheridan Ordin, Morgan, Lewis & Bockius, Los Angeles, California, for amicus curiae Qwest Communications Corporation.

OPINION

RYMER, Circuit Judge:

Is there a private right of action to recover damages for violating regulations promulgated by the Federal Communications Commission (FCC) pursuant to § 276 of the Telecommunications Act of 1996 that require inter-exchange carriers to compensate payphone service providers for "dial-around" telephone calls made from their

payphones? The district court held that there was not, and we agree. We therefore affirm dismissal of an action by Zane Greene and other payphone service providers against Sprint Communications Company, a long-distance telecommunications carrier, and several of its facilities-based resellers (collectively, Sprint).

I

Payphone service providers (PSPs) own payphones made available to the public. Sometimes they are paid directly by the caller, as when coins are deposited into the payphone; other times, they receive commission payments from the carrier to which 0+ calls are automatically routed by a presubscription agreement. However, access code calls and toll free calls are coinless calls. These calls are initiated over a PSP payphone and are routed over telecommunications networks and facilities such as those maintained by Sprint. The interexchange carrier (IXC) is paid for coinless calls through calling cards, credit cards, and the like. PSPs allege that Sprint was obliged by FCC regulation to compensate them for these "dial-around" calls.

Their theory is that Congress, in § 276(b)(1)(A) of the Telecommunications Act of 1996 (the Act), 47 U.S.C. § 276(b)(1)(A), directed the FCC to prescribe regulations that (except for certain emergencies) "establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone." Pursuant to this mandate the FCC promulgated regulations that require carriers, including Sprint and its facilities-based resellers, to compensate PSPs for all

completed coinless calls where the caller uses a carrier other than the payphone's presubscribed carrier. 47 C.F.R. §§ 64.1300, 64.1301. Regulations also require each carrier to track or arrange for tracking of each compensable coinless call carried over its network. 47 C.F.R. § 64.1310. The complaint avers that this can be done with a high degree of accuracy and that, based on the data collected, Sprint is obliged to remit payment of payphone compensation to PSPs on a quarterly basis. PSPs and carriers may contract for a rate at which PSPs will be paid, or else PSPs must be paid at the default per call compensation rate established by the FCC. 47 C.F.R. § 64.1300. Sprint allegedly failed to pay the full amount of payphone compensation owed in violation of § 276 and the regulations, for which PSPs seek compensatory and punitive damages as well as attorney's fees under federal law, an accounting, and a recovery based on an account stated and quantum meruit under state law.

PSPs' complaint was filed in the district court. Before Sprint was served, the court sua sponte dismissed the action without prejudice for lack of subject matter jurisdiction. It held that there is no private right of action for violation of § 276 and the FCC payphone regulations.

PSPs appeal.[1]

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[1] Qwest Communications Corporation, which is an IXC like Sprint and represents that it is a defendant in similar suits throughout the country, filed an amicus curiae brief in support of reversal. The American Public Communications Council, Inc., and APCC Services, Inc., also filed an amici brief supporting Greene. APCC is a trade association that represents independent PSPs, and APCC is a dial-around compensation clearing-house that processes dial-around

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II

PSPs contend that an express private right of action can be found in §§ 206 and 207 of the Act, that this private right of action is applicable to § 276, and that this necessarily implies a private right of action to enforce regulations adopted pursuant to – and within the scope of – § 276. Their fallback position is that a private right of action under § 276 and the regulations must be implied to carry out Congressional intent that PSPs be fairly compensated for use of their payphones.

A

It is axiomatic that private rights of action must be created by Congress. As *Alexander v. Sandoval,* 532 U.S. 275, 288 (2001), instructs, we start with the statute itself. Section 276(b)(1)(A) provides:

> In order to promote competition among payphone service providers and promote the widespread deployment of payphone services to the benefit of the general public, within 9 months after February 8, 1996, the [FCC] shall take all actions necessary (including any reconsideration) to prescribe regulations that –
>
> (A) establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed

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compensation claims on behalf of subscribing PSPs. APCC Services also indicates that it is a litigant in numerous actions in federal court and at the FCC to recover payment for its PSP clients.

> intrastate and interstate call using their payphone, except that emergency calls and telecommunications relay service calls for hearing disabled individuals shall not be subject to such compensation.

47 U.S.C. § 276(b)(1)(A). There is no question that § 276 itself does not create a private right of action. However, § 206 makes a common carrier such as Sprint who does anything prohibited, or fails to do anything required, by "this chapter" liable for damages. "[T]his chapter" includes § 276. Section 207, in turn, allows any person claiming to be damaged to make complaint to the FCC, or to bring suit for the recovery of damages in any district court.[2] Thus, if

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[2] Section 206 provides in full:

> In case any common carrier shall do, or cause or permit to be done, any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

47 U.S.C. § 206. Section 207 provides:

> Any person claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the Commission as hereinafter provided for, or may bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction; but such person shall not have the right to pursue both such remedies.

47 U.S.C. § 207.

§ 276 creates a right to compensation, and if it were violated, §§ 206 and 207 supply the right to sue.

Section 276 directs the FCC to come up with a plan for compensation, which the Commission did. But it does not establish a *right* to compensation, or to compensation by *IXCs*. The statute does not say "PSPs shall be entitled to fair compensation," or "IXCs shall pay PSPs." Because the private right of action created by §§ 206 and 207 extends only to violations of "this chapter," and § 276 does not require IXCs to compensate PSPs, there is no "violation" of § 276 for which a private action explicitly lies for payphone compensation.

PSPs argue that a private right of action is nevertheless implicit in the structure of the statute because the FCC is only authorized to regulate common carriers; § 276 specifically directs the FCC to provide for fair compensation to PSPs; therefore, Congress must have intended for the FCC to impose a payment obligation on all common carriers and to afford a private right of action through §§ 206 and 207 to enforce the compensation requirements. The difficulty is that Congress did not say that *IXCs* have to pay,[3] or that private persons may sue for violation of the

[3] The Commission in fact considered an alternative scheme under which the caller would deposit money directly into the payphone (a "caller pays" system), but concluded that IXCs should be responsible for access code and toll-free charges (a "carrier pays" system). *See* Notice of Proposed Rulemaking, Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket No. 96-128, 11 FCC Rcd 6716, ¶¶ 25-28 (re. [sic] June 6, 1996); Report and Order, Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, 11 FCC Rcd 20541, ¶¶ 17, 83-85 (rel. Sept. 20, 1996).

regulations. It could easily have done so, as indeed it did elsewhere in the Act. Section 227, for example, authorizes an action for violation of the section "or the regulations prescribed under this subsection." 47 U.S.C. § 227(b)(3)(A). We decline to attribute a similar intent to the regulations prescribed by § 276 given that Congress knew how to create a private action for violating a regulation when it wanted to, yet did not include an action for violating the regulations contemplated by § 276 in the text of § 276, § 206, or § 207.

PSPs urge us to heed the observation in *Sandoval* that "it is . . . meaningless to talk about a separate cause of action to enforce the regulations apart from the statute. A Congress that intends the statute to be enforced through a private cause of action intends the authoritative interpretation of the statute to be so enforced as well." *Sandoval,* 532 U.S. at 284. However, as *Sandoval* itself illustrates, this is not true of all regulations. There, the Court held that private individuals could not sue to enforce disparate-impact regulations promulgated under § 602 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.,* even though a private right of action does exist to enforce disparate-treatment regulations under § 601. Section 601 provided that "no person . . . shall . . . be subjected to discrimination," while § 602 authorized federal agencies to effectuate the provisions of § 601 by regulations. The problem arose because disparate-impact regulations went beyond the proscription of § 601, which reaches only intentional discrimination, and "a 'private plaintiff may not bring a [suit based on a regulation] against a defendant for acts not prohibited by the text of [the statute].'" *Sandoval,* 532 U.S. at 286 (quoting *Central Bank of Denver, N.A. v. First Interstate Bank of Denver,*

N.A., 511 U.S. 164, 173 (1994)). "That right must come, if at all, from the independent force of § 602." *Id.* The Court found no freestanding right of action to enforce regulations under § 602 for several reasons, first among them being the absence of "rights-creating" language in § 602 by contrast with § 601. *Id.* at 288-89. The lack of rights-creating language in § 276 is crucial here as well.[4]

In sum, there is no language in § 276 expressly conferring upon PSPs a right to fair compensation from IXCs. For this reason, there is no violation of the Act to be remedied through the private right of action afforded by §§ 206 and 207. Neither does § 276 itself, or through §§ 206 and 207, provide a private right of action to enforce regulations promulgated pursuant to § 276. This leaves only the fact that Congress articulated the objective of fair compensation for PSPs, and authorized the FCC to promulgate a plan to assure it, in § 276. However, we discern no intent to create a private right of action from these acts alone.

B

Even if there is no private right of action through §§ 206 and 207 to collect payphone compensation, PSPs argue that one should be implied under *Cort v. Ash*, 422

[4] We are not persuaded to the contrary by *Precision Pay Phones v. Qwest Communications Corp.*, 210 F. Supp. 2d 1106, 1115 (N.D. Cal. 2002), upon which PSPs rely, because it was premised on the existence of a statutory right to fair compensation.

U.S. 66 (1975). All of the *Cort* factors[5] are satisfied here, they submit, because § 276 identifies payphone service providers as a class to be protected; the purpose of § 276 coupled with the directive to the FCC to provide details of a compensation plan indicates a legislative intent to create a remedy for PSPs; implying a private remedy is consistent with the underlying purposes of § 276 to promote competition among PSPs and widespread deployment of payphone services to benefit the public; and the cause of action is not traditionally relegated to state law because deployment of payphones is a matter of national concern.

What we have said so far largely disposes of the *Cort* analysis, for "it is clear that the critical inquiry is whether Congress intended to create a private right of action." *Walls v. Wells Fargo Bank,* 276 F.3d 502, 508 (9th Cir. 2002) (citing *Sandoval,* 532 U.S. at 286). We think it did not. While it appears that Congress sought to ensure that PSPs are fairly compensated and intended for the FCC to formulate a plan to accomplish this, as the Second and Third Circuits have pointed out, "the purpose of the

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[5] The factors are:

> First, is the plaintiff one of the class for whose especial benefit the statute was enacted . . . that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Cort, 422 U.S. at 78 (citations and internal quotation marks omitted).

Telecommunications Act is not to benefit individual plaintiffs but to 'protect the public interest in communications.'" *Conboy v. AT & T Corp.*, 241 F.3d 242, 254 (2d Cir. 2001) (quoting *Lechtner v. Brownyard*, 679 F.2d 322, 327 (3d Cir. 1982) (quoting *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 14 (1942))). The stated goal of § 276 is to "promote competition among payphone service providers and promote the widespread deployment of payphone services to the benefit of the general public." It is not for us to say whether a private remedial scheme to enforce a regulatory regime for payphone compensation would be a sensible, simpler, or better means to this end; that is for Congress to decide. *Central Bank of Denver*, 511 U.S. at 177; *Sandoval*, 532 U.S. at 286-87. In any event, as *Conboy* explains, the FCC is the agency that is primarily responsible for the interpretation and implementation of the Telecommunications Act and of its own regulations. *See, e.g., Conboy*, 241 F.3d at 251-54 (rejecting an argument similar to PSPs' for implying a private right of action for violation of different FCC regulations); *see also Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 20541, ¶¶ 112-114 (rel. Sept. 20, 1996) (discussing procedures for compliance and complaints), *on reconsideration* 11 FCC Rcd 21233 (rel. Nov. 8, 1996). To imply a private right of action runs counter to this centralization of function and to the development of a coherent national communications policy. It would also put interpretation of a finely-tuned regulatory scheme "squarely in the hands of private parties and some 700 federal district judges, instead of in the hands of the Commission. . . . The result would be to deprive the FCC of necessary flexibility and authority in creating, interpreting, and modifying communications policy." *Conboy*, 241

F.3d at 253 (quoting *New England Tel. & Tel. Co. v. Public Utils. Comm'n,* 742 F.2d 1, 6 (1st Cir. 1984) (Breyer, J.)). This we are unwilling to do, particularly in an area where it is presumed that no private rights of action are intended. *See Scripps-Howard,* 316 U.S. at 14; *Maydak v. Bonded Credit Co. Inc.,* 96 F.3d 1332, 1333-34 (9th Cir. 1996) (applying "presumption" that private litigants have standing only as representatives of the public interest); *Lechtner,* 679 F.2d 322 (same).

Conclusion

There is no private right of action for the relief that PSPs seek, to recover damages for Sprint's alleged failure to pay compensation for dial-around calls as required by FCC regulations promulgated pursuant to § 276 of the Telecommunications Act. None appears explicitly in § 276, nor is any such remedy implicit in the private right of action recognized by §§ 206 and 207 for violations of § 276; § 276 does not create a right for PSPs to be compensated by IXCs or to sue for violation of the regulations. We decline to imply a private right of action primarily because Congress has manifested no intent to allow one, and other considerations pertinent to that inquiry do not counsel in favor of doing so. This being the case, there is no federal claim for PSPs to pursue. Accordingly, the district court properly dismissed the action.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ZANE GREENE, et al., Plaintiffs, v. SPRINT COMMUNICATIONS, et al. Defendants,	CV 02-3841 LGB (PJWx) ORDER DISMISSING ACTION WITHOUT PREJUDICE (Filed Jul. 1, 2002)

I. INTRODUCTION

A group of pay phone service providers ("Plaintiffs") bring this action against Spring Communications and other named facilities-based resellers of Sprint's long distance communications services ("Defendants") to recover funds allegedly owed to them.

II. FACTUAL BACKGROUND

Under the Federal Telecommunications Act, pursuant to 47 U.S.C. § 276, the Federal Communications Commission ("FCC") promulgated 47 CFR § 64.1300. Plaintiffs claim that Sprint and other named Defendants have violated 47 CFR § 64.1300, which mandates that all carriers shall compensate pay phone service providers for each phone call made using their pay phone, except for emergency calls and relay service calls for the hearing

impaired.[1] Plaintiffs also allege that Defendants have failed to pay them the full amount of pay phone compensation owed to them under the FCC's regulation. (Compl. ¶ 2). Plaintiffs seek the compensation allegedly owed by Defendants, plus punitive damages, interest, costs, and attorney's fees. (*Id.*).

III. JURISDICTIONAL

A. FEDERAL QUESTION JURISDICTION UNDER 28 U.S.C. § 1331

Federal Rule of Civil Procedure 8(a)(1) mandates that a complaint in a federal action contain "a short and plain statement of the grounds upon which the court's jurisdiction depends." Here, Plaintiffs claim federal question jurisdiction under 28 U.S.C. § 1331. (Compl. ¶ 62). Section 1331 provides that federal district courts have "original jurisdiction of all civil actions arising

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[1] The regulation provides, in relevant part:

> (a) . . . the first facilities-based interexchange carrier to which a complete [sic] coinless access code or subscriber toll-free pay phone call is delivered by the local exchange carrier shall compensate the pay phone service provider for the call at a rate agreed upon [sic] the parties by contract.
>
> (b) The compensation . . . shall not apply to calls to emergency numbers, calls by hearing disabled persons . . .
>
> (c) In the absence of an agreement as required by paragraph (a) of this section, the carrier is obligated to compensate the pay phone service provider at a per call rate of $.24.

47 C.F.R. § 64.1300.

under the Constitution, laws, or treaties of the United States." The term "arising under" has been construed as extending to cases where an issue of federal law is an essential ingredient in the resolution of the claim. *See Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983). Unless federal law creates a private cause of action, however, violations of a federal statute do not generally constitute sufficient grounds for asserting federal question jurisdiction. *See Merrel Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 817 (1986).

B. IS THERE A PRIVATE CAUSE OF ACTION?

Plaintiffs assert that their claim arises under a federal statute, 47 U.S.C. § 276, which authorizes the FCC's regulation that the Defendants have allegedly violated. In addition, Plaintiffs contend that federal law provides a private cause of action under 47 U.S.C. § 207. (Compl. ¶ 62). Section 207 states that "any person claiming to be damaged by any common carrier subject to the provisions of this chapter . . . may bring suit for recovery of . . . damages in any district court of the United States" 47 U.S.C. § 207.

This court, however, has not found a single case upholding federal jurisdiction based on these grounds. In fact, the weight of authority holds that a violation of FCC regulations does not create a private cause of action under section 207. *See Phonetel Tech. Inc. v. Network Enhanced Telecom*, 197 F. Supp. 2d 720, 722 (E.D. Tex. 2002); *See also Precision Pay Phones v. Global Crossing Telecom.*, 2001 WL 1456766 (N.D. Cal. Nov. 6 2001). *See also Conboy v. AT & T Corp.* 84 F. Supp. 2d 492 (S.D.N.Y. 2000), *aff'd*, 241 F. 3d 242 (2nd Cir. 2001). According to the *Phonetel*

court, section 207 does not create an express cause of action for violations of FCC regulations created pursuant to title 47, but rather, only creates causes of action for violations of title 47 itself. *See Phonetel,* 197 F. Supp. at 722.

Additionally, Plaintiff's indication that 47 U.S.C. § 276 creates federal question jurisdiction is misplaced, because the statutory section does not itself create a private cause of action. *Id.* at 721. Rather, section 276 only addresses the responsibilities of the FCC, as the purpose of the statute is to delegate authority to the FCC to mandate regulations such as 47 C.F.R. § 64.1300. *See id.* at 722. So read, section 276 can only be violated by the FCC. *Id.* It therefore does not serve as a statutory basis for a private cause of action under § 207.

Moreover, 47 C.F.R. § 64.1300 does not explicitly provide for a private right of action. *Id.* at 723. Other courts have noted that an examination of FCC regulations promulgated pursuant to the Telecommunications Act demonstrates that when the drafters intended to prohibit or provide for a private right of action, they did so explicitly in the regulation itself. *Conboy* 84 F. Supp. 2d at 492. Further, it is questionable whether a federal agency such as the FCC can ever create an implied right of action. *See Smith v. Dearborn Financial Services* 982, [sic] F. 2d 976, 980 (6th Cir. 1993); *See also Phonetel,* 197 F. Supp. at 722, n.1. Finally, there is a presumption against private causes of action under the Federal Communications Act. *Maydak v. Bonded Credit Card Co. Inc.,* 96 F. 3d 1332, 1333 (9th Cir. 1996). All of these factors defeat the argument that section 276 provides this court with federal question jurisdiction. As neither 47 U.S.C. § 207, 47 U.S.C. § 276, or 47 C.F.R. § 64.1300 create federal jurisdiction under 28

U.S.C. § 1331, the case is properly DISMISSED WITHOUT PREJUDICE for lack of subject matter jurisdiction.

III. [sic] CONCLUSION

Accordingly, because Plaintiff has failed to demonstrate that there is a private right of action for violations of 47 C.F.R. § 64.1300, jurisdiction is improper under 28 U.S.C. § 1331. The court, therefore, ORDERS this action DISMISSED WITHOUT PREJUDICE.

IT IS SO ORDERED

Dated: July 1, 2002

/s/ Lourdes G. Baird
LOURDES G. BAIRD
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ZANE GREENE; et al., Plaintiffs-Appellants v. SPRINT COMMUNICATIONS COMPANY, a Delaware limited liability company; et al., Defendants-Appellees.	No. 02-56339 D.C. No. CV-02-03841-LGB Central District of California, Los Angeles ORDER (Filed Oct. 14, 2003)

Before: KOZINSKI, FERNANDEZ, and RYMER, Circuit Judges.

The panel has voted to deny the petition for rehearing. Judges Kozinski and Rymer have voted to deny the petition for rehearing en banc and Judge Fernandez so recommends.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and petition for rehearing en banc are DENIED.